

IT 95-30

Tax Type: INCOME TAX

Issue: Unreported/Underreported Receipts (Fraud)
Federal Change (Individual)

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
ADMINISTRATIVE HEARINGS DIVISION
CHICAGO, ILLINOIS

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THE DEPARTMENT OF REVENUE      )  
OF THE STATE OF ILLINOIS      )  
                               )   Harve D. Tucker  
v.                             )   Administrative Law Judge  
                               )  
TAXPAYER 1                     )   Docket No.:  
                               )   FEIN:  
TAXPAYER 2                     )   Docket No.:  
                               )   SSN:  
Taxpayers                     )  
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RECOMMENDATION FOR DISPOSITION

APPEARANCES: XXXXX, for Taxpayer 1 and Taxpayer 2; Sean Cullinan, Special Assistant Attorney General, for the Department of Revenue.

SYNOPSIS: On May 21, 1991, the Department of Revenue (hereinafter sometimes referred to as the "Department") issued a Notice of Tax Liability against Taxpayer 1 (hereinafter "Taxpayer 1"), Notice of Tax Liability XXXXX, for Retailer's Occupation and Use Tax (hereinafter "ROT"), for the tax years December 31, 1984 through December 31, 1989. A hearing was held and the Notice of Decision dated December 4, 1992 (hereinafter "ROT Notice of Decision"), upheld all tax and penalties associated within the Notice of Tax Liability. This ROT Notice of Decision was based on an increase in taxable receipts unreported by Taxpayer 1. On May 14, 1993, Taxpayer 1 filed a complaint for administrative review in the Circuit Court of Cook County, Illinois. By order dated September 23, 1993, the Circuit Court dismissed the suit for failure to meet jurisdictional prerequisites and the decision became final.

On November 12, 1993, the Department of Revenue issued a Notice of Deficiency against Taxpayer 1, for income tax for tax years ending December 31, 1984 through December 31, 1988 in the amount of \$26,801, inclusive of tax and penalties to the date of issuance. The basis of the proposed assessment was to reflect the unreported receipts as determined in the ROT Notice of Decision, a penalty for failure to pay the entire tax liability by the due date and a penalty for filing fraudulent returns. (Dept. Ex. No. 4) By its protest, Taxpayer 1 alleges that the Notice of Deficiency was not issued timely and that it was not calculated correctly. (Dept. Ex. No. 5)

On May 19, 1993, the Department of Revenue issued a Notice of Deficiency against Taxpayer 2 (hereinafter Taxpayer 2), for income tax for tax years ending December 31, 1984 through December 31, 1988 in the amount of \$51,431, inclusive of tax, penalties and interest to the date of issuance. As sole shareholders of Taxpayer 1, an "S corporation"¹, the basis of the proposed assessment is to reflect the unreported sales as determined in the ROT Notice of Decision, plus penalties for failure to pay the entire tax liability by the due date and for filing fraudulent returns. (Dept. Ex. No. 2) By their protest, Taxpayer 2 allege that the proposed assessment was based on fictitious and arbitrary figures and on procedures and practices barred by the statute of limitations. (Dept. Ex. No. 3)

By order dated April 7, 1995, the two Notices of Deficiency were consolidated for purposes of hearing.²

Prior to the administrative hearing, the Department's counsel filed Motions for Partial Summary Judgment in the respective matters. The motions were based on the fact that the amounts of unreported taxable receipts of Taxpayer 1 were final, as a matter of law, by the ROT Notice of Decision and, as such, no genuine issue of fact remained as to these amounts as the bases of the proposed tax deficiencies in the respective

Notices of Deficiency herein. I granted the Department's Motion for Partial Summary Judgment, increasing unreported taxable receipts as the bases of the proposed deficiencies.

A hearing was held on April 13, 1995. With the issuance of the order granting partial summary judgment, the only issues to be resolved at the hearing were the impositions of the penalties. Following submission of all evidence and review of the record, it is recommended that the issues be resolved in favor of the Department of Revenue.

FINDINGS OF FACT:

1. The Department of Revenue issued a Notice of Decision against Taxpayer 1 on December 4, 1992, for Retailers Occupation and Use Tax for tax years December 31, 1984 through December 31, 1989. Upon administrative review, the Circuit Court of Cook County dismissed the suit and the decision became final.

2. The basis of the finalized ROT Notice of Decision was the determination by the Director of Revenue that the Taxpayers underreported taxable receipts for the subject tax periods.

3. Pursuant to referral as a result of the ROT Notice of Decision, the Department proposed to increase taxable income of the Taxpayers by the following amounts, based on increases in taxable receipts determined in the ROT Notice of Decision, as described above:

12/31/84	\$244,352
12/31/85	\$239,310
12/31/86	\$231,754
12/31/87	\$252,263
12/31/88	\$ 85,292

4. Notices of Deficiency were issued and the Taxpayers timely protested.

5. The Department's prima facie cases, inclusive of all jurisdictional elements, were established by admission into evidence of the Notices of Deficiency. In addition to the income tax deficiency proposed,

the Notices include the 35 ILCS 5/1002(b) fraud penalty and the 35 ILCS 5/1005 penalty for underpayment of the tax.

CONCLUSIONS OF LAW: It was determined in the ROT Notice of Decision that Taxpayer 1 underreported taxable receipts. I concurred with the Department's position, as detailed in its Motions for Partial Summary Judgment and my orders of April 7, 1995, that the Department is entitled to a judgment as a matter of law by the application of the doctrine of collateral estoppel. Accordingly, the taxable incomes of Taxpayer 1 and Taxpayer 2 are increased by the amounts of unreported taxable receipts determined in the ROT Notice of Decision.

35 ILCS 5/904(a) provides that the findings of the Department of Revenue are prima facie correct and are prima facie evidence of the correctness of the penalties due.³ No witnesses appeared on behalf of the Taxpayers and they have thus failed to provide any evidence to show that they did not willfully fail to collect and pay over tax under 35 ILCS 5/1002(b) or pay the tax required to be shown on the return under 35 ILCS 5/1005.⁴

Therefore, it is recommended that the Notices of Deficiency be finalized as issued.

Harve D. Tucker
Administrative Law Judge

Date

1 See 1361 and 1362(a) of the Internal Revenue Code. An S corporation's income and expenses are divided among and passed through to its shareholders, who then must report the income and expenses on their own income tax returns.

2 For purposes of this recommendation, Taxpayer 1, Inc. and Taxpayer 2 will be referred to as "the Taxpayers."

3 See also *Jefferson Ice Co. v. Johnson*, 139 Ill.App.3d 626 (1st Dist. 1985); *Farmers & Traders State Bank v. Johnson*, 121 Ill.App.3d 43 (4th Dist. 1984).

4 See *Stoecker v. Department of Revenue*, -- F.Supp. -- (N.D. Ill. March

23, 1995); Branson v. Department of Revenue, -- Ill.App.3d --, 644 N.E.2d 1193 (4th Dist. 1994).